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No. 81-38

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, a minor, etc., et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari
to the California Court of Appeal
Second Appellate District

BRIEF OF AMICI CURIAE BELMONT SCHOOL DISTRICT, ET AL. IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

I

Page

Interest of amici curiae 1

II

Summary of argument 2

III

Argument 3

A. The Tinsley case 3

B. The lower court ruling 7

C. Proposition I was a valid initiative measure enacted to override the Crawford-Tinsley I decisions 8

D. The strict scrutiny test does not apply here, since Proposition I does not contain a "suspect" racial classification 9

(1) Not all law dealing with race are subject to strict scrutiny 9

(2) Assuming arguendo strict scrutiny applies, Proposition I is still valid 12

(3) Proposition I does not violate the federal constitution, since the new law specifically conforms to federal constitutional requirements 12

(4) Proposition I gives state educational agencies flexibility in fashioning desegregation remedies 14

E. Proposition I's repeal of the duty under state law to alleviate de facto segregation is not violative of the federal constitution 15

IV

Conclusion 18

TABLE OF AUTHORITIES CITED

Cases

Page

Amador Valley District v. State Board of Equalization (1978), 22 Cal.3d 208 8

Brown v. California, 627 F.2d 1221 (D.C. Cir. 1980) 15, 16

City of Mobile v. Bolden (1980) 100 S.Ct. 1490 .....10, 13

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 19

Crawford v. Board of Education (1976) 17 Cal.3d 280 .....passim

Crawford v. Board of Education (1980) 113 Cal.App. 3d 633 .....12, 13

Dayton Board of Education v. Brinkman (1977) 433 U.S. 406 15

Dayton Board of Education v. Brinkman (1979) 433 U.S. 526, 99 S.Ct. 2971 15

Gomillion v. Lightfoot (1960) 364 U.S. 339 15

Hunter v. Erickson (1969) 393 U.S. 385 9

Lee v. Nyquist, 318 F.Supp. 710 (W.D. N.Y. 1970) 9, 11

McPherson v. School District No. 186, 426 F.Supp. 173 (S.D. Ill. 1976) 20

Milliken v. Bradley, 418 U.S. 717 (1973) 18

Mulkey v. Reitman (1966) 64 Cal.2d 529 8

N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966) cert. denied 385 U.S. 820 13

Personnel Administration v. Feeney (1979) 442 U.S. 256, 99 S.Ct. 2282 9

Reitman v. Mulkey (1966) 387 U.S. 369 8

Reynolds v. Sims (1964) 377 U.S. 533 13

Table of Authorities Cited

Cases

Page

Santa Barbara School Dist. v. Superior Court (1975) 13 C.3d 315 ..... 8, 15, 17, 18

Seattle School Dist. No. 1 v. State of Wash., 633 F.2d 1338 (9th Cir. 1980) 11, 14, 19

Thompson v. School Board, 498 F.2d 195 (4th Cir. 1974) 20

Tinsley v. Palo Alto Unified School District, 91 C.A.3d 871 ..... passim

United States v. School District of Omaha, 418 F.Supp 22 (D. Neb. 1976) aff'd 541 F.2d 1708 (8th Cir. 1976) 20

Constitutions

United States Constitution:

Fourteenth Amendment 7, 10, 16

California Constitution, Article I:

Section 7 7

Section 7(a) 4

Statutes

Equal Educational Opportunities Act of 1974, 20 U.S.C. Sections 1701 et seq. 15

Title VI, 1964 Civil Rights Act 16

Eagleton-Biden Amendment, Pub.L. No. 95-205, 91 Stat. 1460 15

Other Authorities

Comment, Multi-District Desegregation, 26 UCLA Law Review 1183, 1228 (1979) 8

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I

INTEREST OF AMICI CURIAE

This brief is filed on behalf of amici curiae Belmont School District, Las Lomitas School District, Menlo Park School District, San Carlos School District, Woodside School District, Sequoia Union High School District, the County Committee on School District Organization, and Dr. William Jennings, County Superintendent of Schools in San Mateo, California. These amici are school districts and educational officials named as respondents in a state multidistrict desegregation lawsuit, *Tinsley v. Palo Alto*

Unified School District, et al., presently pending in the California Court of Appeal (1 Civ. 50997). The trial court in *Tinsley* dismissed the lawsuit, basing its decision on the constitutionality of Proposition 1. Given the significantly contrasting factual backgrounds of *Tinsley* and *Crawford*, we believe it will be helpful to the Court's analysis to see how Proposition 1 applied to the *Tinsley* case.

II

SUMMARY OF ARGUMENT

The *Tinsley* case illustrates how Proposition I was constitutionally applied in the setting of a multidistrict desegregation lawsuit. The new law's requirement that intentional discrimination be shown before a sweeping interdistrict remedy be imposed is consistent with federal law matching the scope of the remedy with the scope of the violation.

Proposition I was enacted by the electorate to override the *Crawford-Tinsley I* decisions which had expanded a school district's duty to remedy segregation whether intentionally caused by state action or the result of factors over which public agencies had no control. The new law embodies the same distinction contained in the Fourteenth Amendment, between de facto and de jure segregation, and therefore should be judged under the less rigid "rational basis" standard of review. Even under the stricter standard of review, Proposition I passes constitutional muster, given the limited scope of the new law and the legitimate, nonracial interests served by the statute.

Proposition I by its express terms conforms to federal law, and in no way conflicts with the federal constitution. By specifically embracing the protection of the fourteenth amendment, for the same purpose (i.e. avoidance of de jure segregation), Proposition I represents a valid attempt to balance competing educational needs, integration and local control of the schools. Proposition I, while prohibiting judicially mandated assignment or transportation in the absence of de jure acts, gives state and local educational agencies the needed flexibility to fashion appropriate desegregation strategies.

Proposition I's repeal of the *Crawford-Tinsley I* requirements was a proper exercise of the electorate's right to change state constitutional policy. The new law represents a philosophical disagreement with the policy of integration at all costs, without regard for the disruption and problems that such a narrow view entails.

III

ARGUMENT

A. The Tinsley Case

Tinsley involves an appeal from a judgment dismissing petition for writ of mandate filed by 34 parents of elementary school children seeking desegregation relief involving ten school districts in San Mateo and Santa Clara Counties and other state and local agencies serving approximately 22,000 elementary school children. The trial court sustained the school districts' demurrers to the fourth amended petition without leave to amend and entered its judgment of dismissal, from which the parents (hereafter "petitioners") appealed.

This is the second appeal in the case. On April 13, 1979, the state court of appeal issued an opinion in *Tinsley v. Palo Alto Unified School District*, 91 C.A.3d 871. ("Tinsley I"). In *Tinsley I*, the appellate court held that the petitioners had stated a cause of action for interdistrict relief and remanded the case to the lower court for trial. Upon remand, the petitioners filed a fourth amended petition and various answers and responses by the school district respondents were made thereto.

In November, 1979, the voters enacted Proposition I which amended Article I, Section 7(a) of the California Constitution. The school districts raised Proposition I as a defense in the *Tinsley* case and the trial court upheld the constitutionality of the new law. The second appeal followed.

On October 29, 1981, the court of appeal ruled that the *Tinsley* proceedings be stayed pending a decision by the U.S. Supreme Court in *Crawford*. The court stated that the constitutional issues in *Crawford* will, in all likelihood, be determinative of the outcome in *Tinsley*, and that the court should defer until the Supreme Court makes its ruling on the federal constitutional issue.

The "facts" in *Tinsley* are taken from the allegations contained in the fourth amended petition, inasmuch as the procedural posture of the case is that demurrers were sustained and the case dismissed. These allegations have never been proven, since there has never been an evidentiary hearing of any kind in the *Tinsley* case since its inception.

The allegations of the fourth amended petition may be summarized as follows: Segregated schools exist in the respondent school districts, primarily in the Ravenswood City School District, which has a predominantly minority enrollment. Reasonable and feasible steps have been available to the respondents to eliminate such segregated schools, but respondents have failed and refused to take such steps to alleviate the segregation in the schools. A multidistrict remedy provides the only reasonably feasible solution. Petitioners' children are being deprived of equal opportunities for education and equal protection and due process of law.

The *Tinsley* petition also contains the following allegation:

> "Petitioners expressly do not allege any 'de jure', 'de facto' or any acts of any of the respondents which may have contributed, significantly or insignificantly, to the present situation of racially segregated schools in the responding school districts".

This exculpatory allegation, by which petitioners expressly conceded that none of the respondents were in any way responsible for the complained-of segregation, has been important throughout the *Tinsley* case. In essence, petitioners have elected to rely upon a theory of "liability without fault", in the words of the court in *Tinsley I* (91 C.A.3d at p. 898). In the discussion which follows, we will argue that application of Proposition I to the facts of *Tinsley* produced a result consistent with federal decisional law on the same subject (interdistrict desegregation relief), thus indicating the validity of the new law.

In their amicus brief, the *Tinsley* petitioners have emphasized the small distances between the various elementary districts, (compared to the sprawling Los Angeles School district) and the alleged disparity between the test scores of the Ravenswood minority students and those from the surrounding "majority" districts.[1]

Petitioners fail to mention the other aspect of their prayed-for relief. They seek to consolidate 10 separate school districts, most of which have been in existence for more than a century.[2] These districts are located in two separate counties, each with their own separate auxiliary educational services provided under the auspices of the respective county office of education. These districts serve over 22,000 students in 9 distinct communities and are governed by 46 popularly elected school board members, each of whom must reside in their respective districts. Thus, contrary to the picture painted by opposing counsel, *Tinsley,* although on a smaller geographic scale than *Crawford,* potentially involves a widespread reorganization of many districts, reassignment of thousands of students, lengthy bus rides, and a host of other problems.

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[1]Petitioners' reference to the test scores is misleading in that these scores do not compare the relative achievement of the minority students among the various districts, a point noted by the appellate court in *Tinsley I* (91 Cal.App.3d at p.893, fn.12)

[2]Judicial notice may be taken of the dates the various districts were created: Redwood City—1861; Belmont—1861; Portola Valley—1861; Menlo Park—1880; Ravenswood—1892; Palo Alto—1892; Las Lomitas—1904; San Carlos—1927; Woodside—1928.

B. The lower court ruling

In dismissing the *Tinsley* case, the trial judge, Melvin E. Cohn, relied primarily upon the provisions of Proposition I. (A copy of the trial court's memorandum of decision is attached as Appendix A to this brief). Judge Cohn interpreted Proposition I as limiting the due process and equal protection clauses of the state constitution, insofar as student assignment or transportation is concerned, to those obligations or responsibilities of the Fourteenth Amendment as permitted by federal decisional law. The court noted that the new law does not prohibit the governing board of a school district from voluntarily doing whatever it wants within the confines of California law with school integration plans.

The trial court also stated that Proposition I does not violate the federal constitution since it merely limits California courts to what the federal courts can do under the federal constitution. In the court's opinion, the voters of California had a right to add a provision to their constitution which limited their courts in enforcing rights involved in the assignment and transporting of school children. The court concluded that, based on the concession that respondents had committed neither de jure nor de facto acts contributing to the alleged racially segregated schools, the *Tinsley* petition could not be amended successfully under the present constraints of Article I, Section 7 of the California Constitution.

The remainder of this discussion will address the arguments raised about the constitutionality of Proposition I.

C. Proposition I was a valid initiative measure enacted to override the Crawford-Tinsley I decisions

Proposition I was a statewide initiative measure adopted by the voters at the November, 1979 general election. It has been stated that the initiative process under the California Constitution provides a means by which the electorate may effectively override unpopular judicial decisions. Under the initiative process, voters can enact statutes or amendments to the state constitution which override conflicting court decisions insofar as those decisions rely on state law. When decisions rely on federal law, statutes or constitutional amendments enacted under the initiative process are subject to attack on federal constitutional grounds. See *Amador Valley District v. State Board of Equalization* (1978), 22 Cal.3d 208, 248 (Bird, C.J. concurring); *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533, aff'd in *Reitman v. Mulkey* (1966) 387 U.S. 369; *Santa Barbara School Dist. v. Superior Court* (1975) 13 C.3d 315, 330. See also Comment, *Multi-District Desegregation,* 26 UCLA Law Review 1183, 1228 (1979).

Before Proposition I became law, California case law was that a cause of action for relief from de facto segregation could be stated regardless of the absence of any actions by school authorities causing such a condition. *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 290 (single district); *Tinsley I, supra,* 91 C.A.3d 871, 901 (multidistrict relief).

Thus, Proposition I was aimed at overruling the *Crawford-Tinsley I* holdings that de facto segregation was a sufficient basis for a court-ordered remedy involving student

transportation and assignment in either single districts or among several school districts.

D. The strict scrutiny test does not apply here, since Proposition I does not contain a "suspect" racial classification

(1) Not all law dealing with race are subject to strict scrutiny

Opposing counsel contend the "strict scrutiny" test applies to this case because Proposition I is a racial law and contains a racial classification. It has been held that such a strict standard of review only applies where "suspect classifications" are involved which deny equal protection to or violate the rights of minorities. See, e.g., *Personnel Administration v. Feeney* (1979) 442 U.S. 256, 99 S.Ct. 2282.

Opposing counsel have characterized Proposition I's classification as between judicial relief for racial wrongs and all other types of judicial relief. This characterization is obviously prompted by the opposition's desire to trigger the "suspect classification" analysis involved in prior cases dealing with racial laws. See, e.g., *Hunter v. Erickson* (1969) 393 U.S. 385, and *Lee v. Nyquist,* 318 F.Supp. 710 (W.D.N.Y.), aff'd 402 U.S. 935.

The true classification embodied by Proposition I is demonstrated by the facts in *Tinsley. Before* Proposition I became law, the court of appeal held that a cause of action for interdistrict relief was stated despite the absence of any de jure acts by any of the affected school districts. *After* Proposition I, the trial court held that on such cause of action existed. This illustrates the real classification embodied in Proposition I, which is essentially between de

jure and de facto segregation. To be more precise, the new law's true classification is between judicially imposed transportation and assignment remedies for de facto segregation and such remedies for de jure segregation.

Proposition I's real classification between court-ordered remedies for de facto segregation and those for de jure segregation is not a suspect racial classification. The same dichotomy is present under federal law. And, the same degree of protection is available under both Proposition I and the Fourteenth Amendment. Since the scope of Proposition I and the Fourteenth Amendment is co-extensive in this regard, petitioners' argument essentially asks this court to "strictly scrutinize" the Fourteenth Amendment to see if it violates itself. The very statement of the argument reveals its inherent absurdity.

In *City of Mobile v. Bolden* (1980) 100 S.Ct. 1490, the Supreme Court upheld at-large voting for city commissioners, even though at-large voting diluted the impact of the city's minority voters. In its analysis, the court noted:

> Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from "the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy."
>
> 100 S.Ct. at p. 1505

Similarly, Proposition I, which prohibits court-ordered transportation or assignment of students in the absence of de jure segregation, neither violates a "right or liberty protected by the Constitution" nor requires the stricter standard of review.

It is not true, as asserted by the other side, that the new law strips the legislature and the courts of their power to assign or transport students for racial reasons. Quite the contrary, under Proposition I state or local legislatures retain the power to enact laws to alleviate racial imbalance. The prohibition in Proposition I speaks only to certain judicially imposed remedies for de facto segregation. Both the legislature and the courts retain the power to remedy de jure violations. This distinguishes our case from *Lee v. Nyquist,* 318 F.Supp. 710 (W.D. N.Y. 1970), and *Seattle School Dist. No. 1 v. State of Wash.,* 633 F.2d 1388 (9th Cir. 1980) where the statute under attack prohibited local boards from ordering student assignments for racial reasons *under any circumstances.*

In *Tinsley* there are no allegations, let alone evidence, of intentional racial discrimination. From the very outset of this lawsuit, the *Tinsley* petitioners have expressly conceded that *no* de jure action has been taken by any of the respondents. There has been no showing whatsoever that Proposition I will result in racial discrimination in our case. The *Tinsley* petitioner's unsubstantiated and generalized allegation of Proposition I's discriminatory effect cannot, in the absence of specific allegations and evidentiary support, be used to invoke the stricter standard of judicial scrutiny. The *Tinsley* petitioners were free to amend their petition to include allegations of de jure actions following the passage of Proposition I, but elected not to do so.

(2) Assuming arguendo strict scrutiny applies, Proposition I is still valid

Should the Court conclude that the stricter standard of review applies here, we contend that Proposition I nevertheless passes constitutional muster. The compelling governmental purposes behind Proposition I include reduction of racial tensions, channelling scarce funds directly into schools, teachers, and books, the legitimate preference for neighborhood schools, local autonomy, safety considerations, increased parental involvement in school affairs, and avoidance of white flight. (See *Crawford v. Board of Education* (1980) 113 Cal.App.3d 633, 654-655.) The new law is the least restrictive alternative since Proposition I (1) does *not* affect any remedy other than transportation and assignment, (2) does not impair the local board's right to voluntarily implement any type of remedy, and (3) does *not* relieve a local board from its constitutional duty to alleviate de jure segregation.

(3) Proposition I does not violate the federal constitution, since the new law specifically conforms to federal constitutional requirements

Even a cursory reading of the provisions of Proposition I reveals it is not violative of the federal constitution on its face. The new law expressly makes state desegregation requirements equal to the requirements under the federal constitution. Adherence to federal law does not of itself violate that same federal law. It has been uniformly held that only when there is an "unavoidable

conflict" or a "clear collision" between state and federal law, will state law be declared violative of the federal constitution. *Reynolds v. Sims* (1964) 377 U.S. 533, 584; *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 347; *N.A.A.C.P. v. Thompson*, 357 F.2d 831 (5th Cir. 1966), cert. denied 385 U.S. 820, 832-833.

There is no such "collision" or "conflict" between Proposition I and federal law. What Proposition I does is render state law and federal law congruent on the duty to desegregate schools. By its own terms, Proposition I cannot conflict with the federal constitution because it expressly directs California courts to apply federal constitutional law in determining whether mandatory student reassignment or transportation should be ordered.

The *Crawford* petitioners and amici attempt to characterize Proposition I as a racial law with an unlawful purpose. In making this argument, reference is made to the infamous *Dred Scott* case, and the supposed history of racial discrimination in California. We urge the court not to be misled by such highly inflammatory rhetoric. Proposition I should be judged on its merits, rather than by reference to mistakes of the past. As recently stated by Justice Stewart in *City of Mobile v. Bolden* (1980) 100 S.Ct. 1490, at page 1503:

> Past discrimination cannot, in the manner of the original sin, condemn governmental action that is not itself unlawful.

(4) Proposition I gives state educational agencies flexibility in fashioning desegregation remedies

Excluded from the scope of Proposition I are three types of desegregation remedies: (1) judicially imposed remedies which do not involve student transportation or assignment; (2) mandatory transportation and assignment remedies imposed by public entities other than the courts, e.g., the state legislature, the state board of education, etc. and (3) voluntary remedies adopted by local school districts which could include transportation and assignments. It is important to point out that under Proposition I these three types of remedies are available in *both* the de facto and the de jure situation. The continued availability of these remedies is significant in several ways.

First, the availability of these remedies rebuts petitioner's contention that the law promotes intentional segregation. Second, since Proposition I does not in any way prohibit a local school board from voluntarily implementing broad desegregation plans, our case is distinguishable from *Seattle School Dist. No. 1 v. State of Wash.*, 633 F.2d 1338 (9th Cir. 1980). In *Seattle*, the Ninth Circuit invalidated Initiative 350, a state statute which flatly prohibited local officials from adopting desegregation plans involving busing beyond neighborhood schools (633 F.2d at p.1347). Nothing contained in Proposition I prohibits local school boards in California from adopting such plans.

E. Proposition I's repeal of the duty under state law to alleviate de facto segregation is not violative of the federal constitution

We contend that the fact that Proposition I repealed the state duty to alleviate de facto segregation with certain remedies does not violate the federal constitution. A number of cases have held that the recission of action not required by the fourteenth amendment does not violate equal protection. In the context of school desegregation, the U.S. Supreme Court has explicitly stated that the recission of affirmative action is not unconstitutional unless the initial action was constitutionally required. *Dayton Board of Education v. Brinkman* (1977) 433 U.S. 406, 414; reaffirmed in *Dayton Board of Education v. Brinkman* (1979) 433 U.S. 526, 531, fn. 5, 99 S.Ct. 2971, 2976; see also *Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 329.

The U.S. Court of Appeals recently dealt with a very similar situation in *Brown v. California*, 627 F.2d 1221 (D.C. Cir. 1980). *Brown* involved federal statutes which, like Proposition I, limited mandatory reassignment without interfering with rights and duties under the Federal Constitution. In *Brown*, a group of minority schoolchildren contended that various sections of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* (also known as the Esch Amendments) and the Eagleton-Biden Amendment, Pub.L. No. 95-205, 91 Stat. 1460, were unconstitutional. The statutes challenged by plaintiffs removed the right of the Department of Health, Education and Welfare (HEW) to engage in its practice of requiring mandatory reassignment of students as a condition to fed-

eral educational funds. Like Proposition I, the federal statutes placed limits only upon mandatory student reassignment; they did not prevent HEW from requiring other remedies as a condition to receiving federal educational funds or from requesting the Department of Justice to sue for relief (including reassignment) under the fourteenth amendment and Title VI of the 1964 Civil Rights Act.

The *Brown* plaintiffs argued that (1) the statutes were unconstitutional because they hampered HEW's efforts to desegregate schools and thereby impermissibly involved the federal government in the preservation of school segregation and (2) the statutes were adopted with an improper legislative intent to inhibit school desegregation. The Circuit Court, in an opinion by Judge David L. Bazelon, rejected both arguments and affirmed the trial court's ruling in all respects. Judge Bazelon's opinion in *Brown* has direct relevance to the issue of the constitutionality of Proposition I:

> [A]ppellants assert that the amendments by their plain terms, effect and purpose violate the fifth amendment by eliminating 'the single, proven, and more effective remedy for desegregating schools receiving federal aid.' There are actually two prongs to this claim. The amendments will effectively inhibit desegregation and thereby dilute the guarantees of the fifth amendment; and the amendments reflect an impermissible legislative motivation to inhibit desegregation. Because of the amendments on their face leave open many apparently effective avenues for desegregation, we are not persuaded by either argument.
>
> 627 F.2d at p.1230

So too with Proposition I. It leaves open the possible use of mandatory reassignment or voluntary plans by local boards under appropriate circumstances.

Santa Barbara School Dist. v. Superior Court (1975) 13 C.3d 315 is also relevant on the repeal issue. In *Santa Barbara*, a similar argument was made by amicus curiae that Prop. 21's repeal of several Education Code sections which mandated racially balanced schools rendered the proposition unconstitutional. First, the court stated that the argument necessitated a finding by way of judicial notice that school boards fail to fulfill their constitutional obligation, a finding the court was unwilling to make on the record before it (13 C.3d at p. 329-330). Secondly, the court viewed the essence of the argument to be that the legislative policy of racially balanced schools was inherently invulnerable to change through the initiative process. the court responded to this aspect of the argument as follows:

> On the contrary, since racial balance determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy, the people of California through the initiative process have the power to declare state policy. The repealing provisions of Proposition 21 can conceivably be interpreted as an expression by the people of this state of their preference for a "neighborhood school policy." (See *Keyes v. School Dist. No. 1, Denver, Colo., supra,* 413 U.S. at p. 206 [37 L.Ed.2d at p. 562].) We deem it unnecessary to the resolution of the issues now before us to determine precisely what was the intention of the electorate in this respect and accordingly intimate no views on the subject. We merely conclude that since a policy in favor of neighborhood

> schools is a reasonably conceivable one and since such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the repealing provisions found in section 2, 3 and 4 cannot be struck down as constitutionally impermissible. It may be that our assessment of the people's desires in this respect is erroneous; if so, constitutional processes are available to the people to reinstate what has been repealed.
>
> *Santa Barbara School Dist. v. Superior Court, supra,* 13 Cal.3d at p. 330.

The reasoning in *Santa Barbara* applies with equal if not greater force to the facts of this case. The *Crawford-Tinsley 1* line of cases, which has been effectively nullified by Proposition I, imposed a higher duty of desegregation as a matter of state constitutional law rather than as a federal constitutional prerequisite. Moreover, a "reasonably conceivable" intention behind Proposition I's repeal of the *Crawford* rule is the electorate's preference for neighborhood schools absent a constitutional violation.

IV

CONCLUSION

This Court has recognized that any desegration remedy, especially one which crosses district lines, involves two competing interests—the interest in an integrated educational system and the interest in local control of public education. *Milliken v. Bradley,* 418 U.S. 717 (1973). An important consideration here is the potential disruption caused by the sweeping multidistrict desegregation plans sought in *Tinsley,* especially where it is conceded that the

racial imbalance resulted from "factors for which no school board is responsible." *Columbus Board of Education v. Penick*, 443 U.S. 449, 480 (1979).

Proposition I is consistent with the principle that local school boards have the initial and primary responsibility to allevate segregation in their community schools. Proposition I embodies this principle by giving local boards the initial power to reassign and transport students. Local boards also retain the authority under Prosposition I to impose mandatory busing and assignment remedies even in the absence of a finding of de jure segregation. This, in our judgment, is a significant aspect of the new law. Unlike Initiative 350 in the *Seattle* case, local boards have not been deprived of the use of these remedies in meeting their responsibility to alleviate racial isolation within their schools.

Cutting through all of the legalisms and technical arguments raised in this case, the fundamental question facing this Court is when and under what circumstances should court-ordered mandatory busing and student reassignment take place. In 1976 the California Supreme Court in the *Crawford* decision articulated a standard that required a school board to undertake reasonably feasible steps to alleviate segregated schools regardless of its cause. The California electorate, by adopting Proposition I, retreated from that standard and have opted for such mandatory remedies only when intentional discrimination is shown.

Petitioners ask this Court to discard the intention of the electorate and to impose mandatory assignment and transportation remedies whenever racial isolation occurs

in the schools irrespective of the reasons or causes for such isolation. We submit that parents of school age children can and do have perfectly legitimate nonracial reasons for being opposed to such a result. The safety and fatigue factors involved in long bus rides have been cited by several lower federal courts in ruling against mandatory busing. *McPherson v. School District No. 186,* 426 F.Supp. 173 (S.D. Ill. 1976); *Thompson v. School Board,* 498 F.2d 195 (4th Cir. 1974); *United States v. School District of Omaha,* 418 F.Supp. 22 (D. Neb. 1976) aff'd 541 F.2d 1708 (8th Cir. 1976). The difficulties young children encounter when making the transition from a sheltered home environment to the public school are exacerbated by lengthy bus rides which take the child even further from home. In addition, removing a child already enrolled in one school for several years and assigning him or her to a different school presents further problems. Student friendships are destroyed, the educational process is fragmented, and readjustments to a strange environment have to be made.

The implicit assumption throughout the arguments by the other side is that the legal standards governing the obligations of school districts to remedy segregation can change in one direction only—towards *more* court ordered busing, *more* mandatory reassignments, *more* erosion of local control. We submit that the voters of California in adopting Proposition I have chosen a different path and that, in the absence of a discernible constitutional violation, that this court should not upset that choice.

Dated: January 26, 1982

Respectfully submitted,

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(Appendix follows)